FH

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[redacted]

DECISION

CWA/170861

PRELIMINARY RECITALS

Pursuant to a petition filed December 18, 2015, under Wis. Admin. Code § HA 3.03, to review a decision by the Bureau of Long-Term Support in regard to Medical Assistance (MA), a hearing was held on March 23, 2016, at Waukesha, Wisconsin. Post-hearing, the record was held open for the parties to submit written closing arguments. The record was closed on April 29, 2016 after submission of all closing briefs.

The issue for determination is whether the IRIS agency properly terminated the Petitioner's request for 2:1 staffing.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[redacted]

Petitioner's Representative:

[redacted]

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, Wisconsin 53703

By: Attorney [redacted]
Bureau of Long-Term Support
1 West Wilson

Madison, WI

ADMINISTRATIVE LAW JUDGE:
Debra Bursinger
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner is a resident of Waukesha County. Petitioner resides with her parents and sibling. She has been enrolled in the IRIS program since December 4, 2009.

2. On September 23, 2015, the IRIS Consultant (IC), IC Supervisor, and Disability Rights Wisconsin (DRW) ombudsman met with the Petitioner and her mother. At the meeting, the IRIS agency learned that the Petitioner's mother was authorizing timesheets for two Supportive Home Care (SHC) – Companion Care workers at the same time in a 2:1 caregiving arrangement.

3. The Petitioner does not receive personal care services funded through MA card services, either as Medicaid Personal Care (MAPC) or Self-directed Personal Care (SDPC). A referral was made for the Petitioner for SDPC in or about January, 2016. The referral was returned because the agency determined the Petitioner only needs occasional or intermittent care and there must be a daily need to be eligible for SDPC.

4. The Petitioner's ISSP includes the following:

   Supportive Home Care – Companion Care: 252 units/year, 21 hours/month; 3 aides who work with her 3 hours/week in the community

   Daily Living Skills: 72 units/year, 6 hours/month

   Supportive Home Care: 5,820 units/year, provided by Petitioner's parents

   Supportive Home Care – Respite: 149 units/year, 12.4 hours/month

5. On or about October 6, 2015, a Long Term Care Functional Screen (LTCFS) was completed for the Petitioner. The Petitioner was found to meet the Developmental Disability target group. She was noted to have diagnoses of autism and seizure disorder. She was found to require assistance with some activities of daily living (ADLs) due to cognitive deficits. Specifically, she requires verbal prompts to shower and occasional assistance with washing her hair. She is otherwise able to complete the bathing task independently. With regard to dressing, she was noted to require assistance with choosing weather appropriate clothing but is otherwise able to dress independently. For toileting, the Petitioner requires assistance with cleansing after bowel movements and assistance with hygiene products when she has her menstrual cycle. She is note physically resistive to cares. With regard to Instrumental Activities of Daily Living (IADLs), it was reported that the Petitioner is able to make simple meals for herself but requires assistance in determining if food has spoiled, with operation of kitchen appliances and with eating appropriate amounts of food. Petitioner also requires assistance with setting up medications and reminders to take medications. She needs assistance with all money transactions. She requires cueing for household chores. She does not know how to use a telephone and is unable to drive due to cognitive impairment. The LTCFS notes that the Petitioner has offensive/violent behaviors and self-injurious behaviors requiring intervention 1 – 2x/day. It further notes that she attempts to leave the home during the day, particularly when mad at her mother. The home has an alarm system to alert her parents if she attempts to leave. She is also reported to wander in public. Her self-injurious behavior includes banging her head on a wall or table when upset, approximately 2 – 3x/month. Petitioner's violent behavior includes biting, kicking, hitting, shoving and yelling at others when she is upset, approximately 4 – 6x/month. She takes medications to address her behavioral issues. It is reported that the Petitioner is verbal but she has substantial communication deficits.

6. On December 11, 2015, the IRIS agency issued a Notice of Action to the Petitioner informing her that the agency determined it would terminate her 2:1 staffing because the service is not medically necessary and is duplicative.

7. On December 18, 2015, the Petitioner filed an appeal with the Division of Hearings and Appeals.

DISCUSSION

The Medicaid program reimburses providers for medically necessary and appropriate health care services listed in Wis. Stat., §§ 49.46 (2) and 49.47 (6) (a), Stats., when provided to currently eligible medical assistance recipients. Wis. Admin. Code, § DHS 107.01. A "medically necessary" service is defined in Wis. Admin. Code, § DHS 101.03 as follows:

> (96m) "Medically necessary" means a medical assistance service under ch. DHS 107 that is:
>
> (a) Required to prevent, identify or treat a recipient's illness, injury or disability; and
> (b) Meets the following standards:
>
> > 1. Is consistent with the recipient's symptoms or with prevention, diagnosis or treatment of the recipient's illness, injury or disability;
> > 2. Is provided consistent with standards of acceptable quality of care applicable to the type of service, the type of provider and the setting in which the service is provided;
> > 3. Is appropriate with regard to generally accepted standards of medical practice;
> > 4. Is not medically contraindicated with regard to the recipient's diagnoses, the recipient's symptoms or other medically necessary services being provided to the recipient;
> > 5. Is of proven medical value or usefulness and, consistent with s. DHS 107.035, is not experimental in nature;
> > 6. Is not duplicative with respect to other services being provided to the recipient;
> > 7. Is not solely for the convenience of the recipient, the recipient's family or a provider;
> > 8. With respect to prior authorization of a service and to other prospective coverage determinations made by the department, is cost-effective compared to an alternative medically necessary service which is reasonably accessible to the recipient; and
> > 9. Is the most appropriate supply or level of service that can safely and effectively be provided to the recipient.

Relevant to this case, § DHS 104.02(1) states a Medicaid recipient may not seek the same or similar services from more than one provider except when a second opinion is warranted.

The IRIS program was developed pursuant to a Medical Assistance waiver obtained by the State of Wisconsin, pursuant to section 6087 of the Deficit Reduction Act of 2005 (DRA), and section 1915(j) of the Social Security Act. It is a self-directed personal care program that allows participants to exercise decision-making authority over workers who provide services and the participant-managed budget. 42 CFR § 441.468(e). The federal government has promulgated 42 C.F.R. §441.450 - .484 to provide general guidance for this program.

IRIS allows eligible individuals to receive certain types of services including personal care and related services, or home and community-based services otherwise available under the State plan or a 1915(c) waiver program. 42 CFR § 441.450(c). "Home and community based services" are defined in the federal regulations:

§ 440.180 Home or community-based services.

(a) Description and requirements for services. "Home or community-based services" means services, not otherwise furnished under the State's Medicaid plan, that are furnished under a waiver granted under the provisions of part 441, subpart G of this chapter.

(1) These services may consist of any or all of the services listed in paragraph (b) of this section, as those services are defined by the agency and approved by CMS.
(2) The services must meet the standards specified in § 441.302(a) of this chapter concerning health and welfare assurances.
(3) The services are subject to the limits on FFP described in § 441.310 of this chapter.

(b) Included services. Home or community-based services may include the following services, as they are defined by the agency and approved by CMS:

(1) Case management services.
(2) Homemaker services.
(3) Home health aide services.
(4) Personal care services.
(5) Adult day health services.
(6) Habilitation services.
(7) Respite care services.
(8) Day treatment or other partial hospitalization services, psychosocial rehabilitation services and clinic services (whether or not furnished in a facility) for individuals with chronic mental illness, subject to the conditions specified in paragraph (d) of this section.
(9) Other services requested by the agency and approved by CMS as cost effective and necessary to avoid institutionalization.

42 CFR § 440.180.

Wisconsin's IRIS waiver allows IRIS recipients to receive supportive home care (SHC) services. "Supportive home care" is defined in the IRIS Waiver as follows:

Supportive Home Care (SHC) is the provision of a range of services for participants who require assistance to meet their daily living needs, ensure adequate functioning in their home and permit safe access to the community.

Supportive home care services include:
1. Personal Services
a. Assistance with activities of daily living such as eating, bathing, grooming, personal hygiene, dressing, exercising, transferring and ambulating;
b. Assistance in the use of adaptive equipment, mobility and communication aids;
c. Accompaniment of a participant to community activities;
d. Assistance with medications that are ordinarily self-administered;
e. Attendant care;
f. Supervision and monitoring of participants in their homes, during transportation (if not done by the transportation provider) and in community settings
g. Reporting of observed changes in the participant's condition and needs and
h. Extension of therapy services. . . .

IRIS 1915(c) DD Waiver, Appendix C

The regulations require the IRIS agency to assess a participant's needs and preferences (including health status) as a condition of IRIS participation. Id., §441.466. The agency must also develop a service plan based on the assessed needs. Further, "all of the State's applicable policies and procedures associated with service plan development must be carried out ..." Id. §441.468.

In this case, the Petitioner's ISSP includes a provision for SHC – Companion Care. It is undisputed that the Petitioner has been utilizing this service to pay for two caregivers to accompany her for community outings. The Petitioner argues that it is necessary for her to have two caregivers in the community at all times due to her behavioral issues and the possibility of a seizure. The agency argues that the MA rules and IRIS waiver do not allow the Petitioner to bill for two caregivers to perform the same service at the same time.

The parties do not dispute that the regulations prohibit a recipient from receiving "duplicate" services. The dispute is with regard to determining what constitutes a duplicate service. I am persuaded by the Petitioner's argument in its closing brief:

> "DHA § 104.02 prevents Medicaid recipients from seeking "the same or similar services from more than one provider" except when a second opinion is required as described in DHS § 104.04. DHS § 104.02 applies to all medical procedures covered by all Medicaid programs, not just to Medicaid waiver programs such as IRIS. There are many, many medical services which necessitate more than one service provider working together to perform them competently. . . It would therefore be illogical to interpret DHS § 104.02 to mean supplication occurs any time two or more provider are engaged the same or similar treatment. A much more logical interpretation of DHS § 104.02 is that a second treatment (or second provider) is only duplicative of the first if one treatment (or one provider) is sufficient to address the Medicaid recipient's medical need."

Petitioner's Closing Argument Brief, pages 4 and 5.

The Petitioner cites to examples where two providers may be needed to perform a service, opinions by medical professionals that two providers may be needed for certain services and a court ruling in Marathon County Circuit Court Case No. [redacted].

While I agree with the Petitioner's argument that the same or similar services from more than one provider is not always a duplication of services, I conclude the agency has properly determined, in this case, that there is a duplication of services.

In this case, two caregivers assist the Petitioner with community outings. There was testimony and evidence from the caregivers, from Petitioner's mother, her treating physician and teachers that the Petitioner requires two caregivers. It is not clear that there has been an assessment or evaluation of the Petitioner by a behavior specialist and no evidence of a behavior plan to demonstrate that having two caregivers is the safest, most effective and most cost-effective alternative to assist the Petitioner in accessing the community. The caregivers and Petitioner's mother testified to different methods that they have devised to de-escalate the Petitioner but there is no evidence that demonstrates that these methods are appropriate or safe or the most cost-effective method to treating the Petitioner. There is no plan that clearly delineates the duties or roles of each of the two caregivers. The fact that the Petitioner's mother is able to take the Petitioner on outings without additional assistance signals that there may be methods that can be employed by one caregiver.

The Medicaid and Medicaid waiver programs are meant to provide basic, necessary medical services to eligible individuals in a cost-effective manner. Services must be the most appropriate supply or level of service that can safely and effectively be provided to the recipient. Services must be provided in a manner that is consistent with acceptable standards of care. Services may not be solely for the convenience of the recipient, the family or the provider. Services cannot be duplicative.

In this case, based on the information available to the agency regarding the services of two caregivers for the Petitioner's community outings, I conclude that the IRIS agency properly determined the services are duplicative.

CONCLUSIONS OF LAW

The IRIS agency properly determined the services of two caregivers accompanying the Petitioner on community outings are duplicative.

THEREFORE, it is **ORDERED**

That the Petitioner's appeal is dismissed.

REQUEST FOR A REHEARING

You may request a rehearing if you think this decision is based on a serious mistake in the facts or the law or if you have found new evidence that would change the decision. Your request must be **received within 20 days after the date of this decision.** Late requests cannot be granted.

Send your request for rehearing in writing to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400 **and** to those identified in this decision as "PARTIES IN INTEREST." Your rehearing request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and explain why you did not have it at your first hearing. If your request does not explain these things, it will be denied.

The process for requesting a rehearing may be found at Wis. Stat. § 227.49. A copy of the statutes may be found online or at your local library or courthouse.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, Wisconsin 53703, **and** on those identified in this decision as "PARTIES IN INTEREST" **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Milwaukee, Wisconsin, this 1st day of July, 2016

\sDebra Bursinger
Administrative Law Judge
Division of Hearings and Appeals

State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on July 1, 2016.

Bureau of Long-Term Support
[redacted]